

REMARKS:

In the foregoing amendments, claim 9 was amended to better define that the passageway set forth in the claims is a passageway for an operator of the vehicle. This structure is readily apparent from applicant's specification disclosure and drawings. Claim 6-9 are pending in the application for consideration by the examiner. Claim 9 is an independent claim. Claims 6-8 depend directly or indirectly from claim 9.

Applicant desires to express thanks to examiners Bill Joyce and Brad Van Pelt for the courtesies extended the undersigned in a personal interview on June 9, 2004. During the interview, it appeared that the examiners appreciated the patentability of applicant's invention. The examiners stated that, if the applicant amended claim 9 to clarify the claimed passageway as a passageway for the operator, this will overcome the immediate prior art rejection.

In the foregoing amendments, applicant amended claim 9 to further define that the passageway as a passageway for an operator of the vehicle arranged between the driver's seat and an exit from the construction machine vehicle. Claim 9 was also amended to define that the locking lever blocks or permits operator passage through the passageway. Applicant respectfully requests that the foregoing amendments be entered under the provisions of 37 C.F.R. § 1.116(b) for the purposes of placing the application in condition for allowance or for the purposes of appeal. The foregoing amendments amend applicant's claims in a manner indicated as allowable by the examiners at the

personal interview. Therefore, applicant respectfully requests that the foregoing amendments be entered under the provisions of 37 C.F.R. § 1.116(b) for the purposes of placing the application in condition for allowance or for the purposes of appeal.

Claims 6-9 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. patent No. 4,641,545 of Rabe. This rejection and applicant's traversal thereof were discussed in the response after final filed on April 12, 2004. These remarks are included below for the examiner's convenience.

Applicant's amended claim 9 defines a *passageway* for an operator of the vehicle arranged between the driver's seat and an exit from the construction machine vehicle. Applicant's amended claim 9 further defines that the locking lever blocks *operator passage* through the *passageway* when switched to the controllable state and permits *operator passage* through the *passageway* when switched to the uncontrollable state. The Official action concluded that it would have been obvious to one having ordinary skill in the art at the time the invention was made to locate the locking lever adjacent to a passageway to a driver's seat, since it has been held that rearranging parts of an invention involves only routine skill in the art.

In the present factual situation, applicant respectfully submits that the position that it would have been obvious to one of ordinary skill in the art at the time the invention was made to locate the locking lever adjacent to a passageway to a driver's seat as proposed in the Official action is not correct. *The main reasons for this are that the location of the presently claimed locking*

lever provides a function and advantage not shown or suggested in the prior art.

Even if it is assumed that Rabe teaches the structural parts of applicant's claimed invention in a different arrangement (which the applicant does not admit), the rearrangement of parts in an old invention to achieve new functions and advantages has been held to be patentable in the courts. *Rosemount Inc. v. Beckman Instruments, Inc.*, 727 F.2d 1540, 221 USPQ 1 (Fed. Cir. 1984), *In re Wright*, 848 F.2d 1216, 6 USPQ2d 1959 (Fed. Cir. 1988).

As explained in *Wright*, "[t]he determination of whether a novel structure is or is not "obvious" requires cognizance of the properties of that structure and the problems which it solves viewed in light of the teachings of the prior art.... [T]he question is whether what the inventor did would have been obvious to one of ordinary skill in the art attempting to solve the problem upon which the inventor was working." In the present factual situation, the teachings of Rabe do not remotely contemplate the problem of preventing access to the controls of a vehicle, while it is in an active state, by structure where operator passage through the passageway is blocked by the locking lever when the locking lever is switched to the controllable state (active), but where operator passage through the passageway to the driver's seat is permitted when the locking lever is switched to the uncontrollable state (inactive), as required in the present claims. Since the teachings of Rabe are not concerned with the problems solved by the applicant's allegedly rearrangement of structure or applicants claimed structure to resolve the problems, the teachings of Rabe could not

possibly motivate one of ordinary skill in the art to the arrangement of structure set forth in the present claims.

As explained in *Northern Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 15 USPQ2d 1321 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 920 (1990), the nature of the problem and the inventor's solution are factors that must be considered in determining whether the invention would have been obvious to a person of ordinary skill in the art. Since the teachings of Rabe do not disclose or suggest the problems solved by the applicant or applicant's solution of the problems, namely, preventing access to the controls of the vehicle during its operation by inhibiting operator access through the passageway to the driver's seat when the vehicle is switched to the controllable (active) state and permitting operator access through the passageway to the driver's when the vehicle is switched to the uncontrollable (inactive) state, these teachings cannot motivate one of ordinary skill in the art to the invention as set forth in the present claims.

The claimed subject matter as a whole must be compared with the teachings of Rabe. *Wright, In re Ochiai*, 71 F.3d 1565, 37 USPQ2d 1127 (Fed. Cir. 1995). There is no discussion or suggestion within the teachings of Rabe that would have motivated one of ordinary skill in the art to the arrangement of structure set forth in the present claims, including inhibiting operator passage through the passageway to the driver's seat when the vehicle is switched to the controllable (active) state and permitting operator passage through the passageway to the driver's seat when the vehicle is switched to the uncontrollable (inactive) state. There is simply no reason in the teachings of

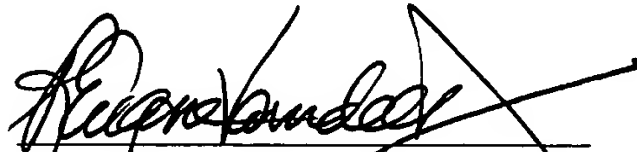
Rabe to do this. Thus, it is impossible for these teachings to motivate one of ordinary skill in the art to the invention as set forth in the present claims.

Based on the above, applicant respectfully submits that the presently claimed invention is patentably distinguishable from the teachings of Rabe within the meaning of 35 U.S.C §103(a). Therefore, applicant respectfully requests that the examiner reconsider and withdraw this rejection. Since it is believed that claims 6-9 are free from prior art, a formal allowance of these claims is respectfully requested.

The foregoing is believed to be a complete and proper response to the Official action mailed December 12, 2003. While it is believed that all the claims in this application are in condition for allowance, should the examiner have any comments or questions, it is respectfully requested that the undersigned be telephoned at the below listed number to resolve any outstanding issues.

In the event this paper is not timely filed, applicant hereby petitions for an appropriate extension of time. The fee therefor, as well as any other fees which become due, may be charged to our deposit account No. 22-0256.

Respectfully submitted,
VARNDELL & VARNDELL, PLLC

A handwritten signature in black ink, appearing to read "R. Eugene Varndell, Jr.", written over a horizontal line.

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